

STATE OF MICHIGAN
COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN,

Plaintiff-Appellee,

V

TOM SUTTON,

Defendant-Appellant.

UNPUBLISHED

December 13, 2002

No. 234074

Wayne Circuit Court

LC No. 00-008768

Before: Smolenski, P.J., and Talbot and Wilder, JJ.

PER CURIAM.

Defendant appeals as of right his conviction following a jury trial of possessing a firearm during the commission of or attempt to commit a felony, MCL 750.227b. The trial court sentenced defendant to two years in prison for the felony-firearm conviction with credit for eighteen days. We affirm.

Timothy Herrick was fatally shot by defendant on July 8, 2001. Defendant maintained that he acted in self-defense. According to defendant, Herrick's ex-girlfriend, Jeannette Gonzalez, had reunited with defendant and Herrick was upset about this. Gonzalez testified that on the evening before the shooting, Herrick had entered defendant's apartment where Gonzalez was sleeping and began to choke, hit, and kick her for fifteen to twenty minutes. Barbara Gustafson interrupted Herrick's assault of Gonzalez when, after she heard screams coming from defendant's apartment at about 3:00 a.m., she entered the apartment and fought with Herrick. Herrick left defendant's apartment when his friend Christopher Gibson arrived.

Herrick returned about five minutes later and again hit Gonzalez, and choked and hit Gustafson. Gibson then made Herrick leave again. Herrick returned once again, and this time defendant was present. Gustafson and Gonzalez testified that Herrick punched and choked defendant and threatened to kill him. Then Gibson and Kevin Kayson, another friend of Herrick's, removed Herrick from the apartment.

Defendant claimed that after this series of confrontations he went outside to fix a door that had been kicked off its hinges, taking with him a 0.22-caliber rifle to protect himself from Herrick. Defendant testified that he wanted Gibson to help him with the door and he crossed a vacant lot near the apartment complex to find him. As he crossed the vacant lot, Herrick charged at him. Defendant claimed that he did not know that Herrick was outside. Defendant stated that

he panicked and shot Herrick with the rifle in an attempt to stop him, but not in an attempt to kill him.

Defendant was charged with second-degree murder and possession of a firearm during the commission of or attempt to commit a felony. After brief deliberations, the jury submitted a written request for “definitions of the counts read by the judge including self-defense.” The trial court consulted with counsel and stated that it had prepared a package of written instructions for the jury,¹ and that those portions of the instructions not read to the jury when the jury was initially instructed had been redacted. Both counsel approved the written instructions proposed by the trial court without objection.

After additional deliberations, the jury indicated to the trial court that it could not reach a unanimous decision. With defense counsel’s consent, the jury was instructed to continue deliberations but was not given the deadlocked jury instruction, CJI 2d 3.12. The jury conducted further deliberations and returned a verdict finding defendant guilty of the felony-firearm charge, but not guilty of second-degree murder. Defendant now appeals his felony-firearm conviction.

Defendant asserts three instructional errors. First, defendant argues the trial court erred by providing a redacted version of the felony-firearm instruction, CJI2d 11.34, after the jury requested re-instruction on all of the charges against defendant. Second, defendant contends the trial court erred by failing to provide the deadlocked jury instruction, CJI2d 3.12, after the jury indicated it could not reach a verdict. Third, defendant contends that the trial court should have instructed the jury on self-defense when it re-instructed the jury regarding felony-firearm because his intent in carrying the weapon was to protect himself from the victim. We disagree with each of defendant’s claims of error.

In each instance, defense counsel approved the trial court’s actions. By acquiescing in the trial court’s actions, defendant waived these issues for appeal. *People v Carter*, 462 Mich 206, 215-216; 612 NW2d 144 (2000). In any event, the record establishes that the jury was properly instructed on each occasion and that the trial court included instructions regarding self-defense when it re-instructed the jury. Thus, defendant’s claims are without merit.

Finally, defendant contends the jury improperly reached an inconsistent verdict by convicting him of felony-firearm while acquitting him of the underlying felony, second-degree murder. We disagree.

It is well settled that a jury is not required to reach consistent verdicts with regard to a felony-firearm charge and the accompanying felony. *People v Duncan*, 462 Mich 47, 54; 610 NW2d 551 (2000), citing *People v Lewis*, 415 Mich 443, 330 NW2d 16 (1982). Nonetheless, defendant contends that “extenuating circumstances” in this case suggest the verdict’s inconsistency occurred because of the jury’s misunderstanding, confusion, or mistake. Specifically, defendant argues that because the jury requested to be instructed again on the

¹ While not expressly stated on the record, it appears that the instructions at issue were copied from the three volume CJI 2d standard instructions.

charged offenses and then subsequently stated that its deliberations were deadlocked, the jury's verdict an hour after it appeared to be deadlocked suggests that the jury was misguided or confused, or that it misunderstood its duties when it reached its verdict.

The record in this case does not support the conclusion defendant would have us draw. The fact that the jury was deadlocked after re-instruction establishes nothing more than that there was disagreement among the jurors about the appropriate verdict in the case, and demonstrates the jury's interest in avoiding confusion, mistake, or misunderstanding. The bald assertion that the jury improperly arrived at its verdict, on the basis of the facts presented here, is insufficient to establish that the jury verdict should be disturbed.

Affirmed.

/s/ Michael R. Smolenski

/s/ Michael J. Talbot

/s/ Kurtis T. Wilder